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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Estate of Daniel Guggenheim, deceased,

FLORENCE GUGGENHEIM, Executrix,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN W. DAVIS,
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Of Counsel.

Dated, New York, N. Y., June 5, 1941.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Estate of Daniel Guggenheim, deceased,

FLORENCE GUGGENHEIM, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Estate of Daniel Guggenheim, Florence Guggenheim, Executrix, petitions for a writ of certiorari to review the decision of one of the issues decided adversely to it by the Circuit Court of Appeals for the Second Circuit in its judgment entered on March 6, 1941, which affirmed a decision of the United States Board of Tax Appeals entered on September 14, 1939, sustaining a deficiency in Federal estate taxes asserted by the Commissioner of Internal Revenue. The remaining issues in the case are not affected by the decision on the question here presented.

The Nature of the Proceeding.

Daniel Guggenheim, the decedent, died testate on September 28, 1930, a resident of Nassau County, New York

(R. 43). Between 1917 and 1925 decedent, as settlor, executed four trust instruments with the Commercial Trust Company of New Jersey, as trustee, of which the agreement dated October 29, 1917 and executed on May 28, 1918 (Ex. 8, R. 198), and the agreement of February 14, 1922 (Ex. 9, R. 211) are alone material. In its finally operative form, the trust agreement provided for a life income for Robert, the son of the decedent, and remainders in trust for the children of the decedent's son and their descendants or appointees, all subject to powers reserved to the decedent to alter, modify and prescribe the proportionate shares of the respective beneficiaries. The power of revocation was expressly relinquished, and by express language the powers reserved excluded any power "to frustrate the essential purposes of the trust of making provision for the son of the Settlor and his children or descendants" (R. 123-129).

The Commissioner of Internal Revenue included the entire value of the trust ($2,290,155.62 at the date of death) (R. 155) in decedent's gross estate. Certain other adjustments were made in the estate tax return not here material. The Board of Tax Appeals sustained the Commissioner's action in respect to the issue here involved and the Circuit Court of Appeals for the Second Circuit affirmed.

The Question Presented.

We concede that the value of Robert's life interest should be included in the gross estate. The narrow question presented is whether the value of the remainder interest is includible under Section 302(d) of the Revenue Act of 1926.

Summary Statement of Matter Involved.

The facts with respect to this issue are stipulated (R. 183-186).

On October 29, 1917, decedent created a revocable trust for the benefit of his son, Meyer Robert Guggenheim, and the child or children of Robert (Ex. 7, R. 187). This trust was revoked, cancelled and superseded by a trust agreement entered into with the Commercial Trust Company of New Jersey, as trustee, on May 28, 1918 (Ex. 8, R. 198). This trust provided for the payment of an annual income of $21,000 to decedent's son, Robert, for a period of 10 years. At the expiration of 10 years, or at the time of any earlier termination, the trust was to terminate and the corpus to be paid over to Robert free of all restrictions. If Robert were not living at that time, however, the trust was to continue for 20 years, during which time the child or children of Robert (restricted by definition to children by his first and second marriages) were to receive the income for their maintenance and education until reaching 21, and the income outright until 20 years after Robert's death, at which time his children were to receive the corpus in equal shares. The decedent, as settlor, reserved to himself a power of revocation (R. 123-126).

On February 14, 1922, the decedent amended the trust in material respects (Ex. 9, R. 211). Two classes of interests were created, a life interest in Robert and a remainder interest in Robert's children (again restricted by definition to children by his first and second marriages). A life income was to be paid to Robert, and upon Robert's death the corpus was to be held in trust for the children of Robert until 20 years after the latter's death, at which time the trust was to terminate and to be divided among such children in equal shares, or if any child were then dead, its share should go to its testamentary appointees or intestate heirs. If a child

died during Robert's lifetime, such child's share both as to income and principal went to his descendants *per stirpes* upon Robert's death. No descendant could be a beneficiary at any time, however, unless his ancestor, the child of Robert, had died. If no child nor descendants of children survived Robert, the property reverted to decedent-settlor or his estate. The instrument conferred upon Robert's three uncles (the settlor's three brothers) power to increase the income payable to Robert, or to decrease the income, even down to no income at all. The decedent relinquished any powers to revoke the trust, but retained powers to alter and modify and to prescribe and change the prospective shares of the beneficiaries, subject to the restriction that such powers could not be exercised to revoke the trust or "to frustrate the essential purposes of the trust of making provision for the son of the Settlor and his children or descendants" (R. 220-221).

Part IV of the 1922 instrument is as follows (Ex. 9, R. 220-221):

> "Nothing in this instrument contained shall be deemed to affect or limit the power of the Settlor to modify, alter or correct the provisions of the said trust agreement of the 29th day of October, 1917, provided that any such modification, alteration or correction shall not operate to revoke the said agreement or the trust existing thereunder, or to frustrate the essential purposes of the trust of making provisions for the son of the Settlor and his children or descendants, or to impair the substantial integrity of the trust fund, or to create a beneficial interest in or under the trust, on behalf of the Settlor or any person not previously beneficially interested therein or thereunder. The Trustee shall not be required to pass upon the legal effect of any such modification, alteration or correction made by the Settlor, or to determine whether the same is within the power or

authority of the Settlor to make; and by reason of any such modification, alteration or correction made by the Settlor the Trustee shall incur no liability to any person whatsoever. Nor shall anything in this instrument contained be deemed to affect or limit the power of the Settlor, by directions in writing given to the Trustee, to alter, define and prescribe the relative interests of the beneficiaries in the trust fund or the income thereof, their respective shares in the same, their respective powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement, postponement or otherwise, of principal or income, or both, of the trust fund; which power of the Settlor is hereby expressly reaffirmed and reserved, together with the power of causing a final distribution to be made at any time to or among the beneficiaries, or any of them, and so terminating the trust."

Under the power to modify, we concede that the decedent could retake from the three uncles the power to increase or decrease Robert's income. But in view of the terms of the trust, it seems reasonably apparent that although the decedent could increase Robert's income up to the full amount of the income of the trust and so deprive Robert's children of the use of current income, the decedent was given no power to reduce the *remainder* for Robert's benefit. The power to revoke was expressly relinquished. The reserved powers to alter the trust could not be exercised in such a way as "to frustrate the essential purposes of the trust of making provision for" Robert, his children and their descendants, or to create new beneficial interests, or to impair the substantial integrity of the trust fund.

If the trust income fell below the fixed amount then annually payable to Robert, the trustee could cure the

insufficiency by a resort to a specific class of items, namely, distributions received on stocks and securities held in the corpus wherever any such distributions had been designated by the payor thereof as a return of capital, in whole or in part. It is probable that this power is meaningless in the light of the foregoing restrictions, but in any event not more than $46,500 was available for such a distribution at the time of death (Ex. 10-a, R. 229), a circumstance going merely to the valuation of the life interest.

The decedent had the power to cause a final distribution to the beneficiaries and so to terminate the trust, but the exercise of this power would merely have had the effect of terminating Robert's life interest and vesting the corpus forthwith in the class composed of Robert's children. The plain import of the trust deed was that there was a line between the life interest and the remainder interest which the decedent could not cross through any of his reserved powers.

Robert was divorced from his first wife and remarried in 1915. Robert had two children by his first marriage, Daniel Guggenheim, II, and M. R. Cordova Guggenheim (hereinafter referred to as Cordova). His child, Daniel, died in 1925 without issue. In 1928 he was divorced from his second wife, by whom he had no children, and remarried the same year (R. 123, 124). Thus, at the time of decedent's death, Robert had only one surviving child of his first and second marriages. The surviving child had no descendants in being at the date of decedent's death. Hence, the class of possible remaindermen was closed at the date of decedent's death.

We maintain that the settlor did not have power to confer upon Robert a share of the remainder. Certainly he could not have conferred upon Robert the entire remainder, for this would have frustrated one of the essential purposes of the trust, namely, to pro-

vide for the children of Robert, as distinguished from Robert himself. If he could confer part only upon Robert, the part which he could not confer was beyond his control. As it happened, at the time of the decedent's death the remainder class was closed, since there was only one child of Robert who was living and entitled to take. The decedent on the date of his death had no power to change the enjoyment of the remainder.

Reasons Why the Writ of Certiorari Should Be Issued.

1. The Circuit Court of Appeals has decided a Federal question in conflict with the decisions of other Circuit Courts of Appeals. We submit that the decision below is in conflict with the decisions of the Circuit Courts of Appeals in *Tait* v. *Safe Deposit and Trust Co. of Baltimore*, 74 F. (2d) 851 (C. C. A. 4th, 1935); *Day* v. *Commissioner*, 92 F. (2d) 179 (C. C. A. 3rd, 1937); and *Commissioner* v. *Flanders*, 111 F. (2d) 117 (C. C. A. 2nd, 1940). Under these cases the value of an interest transferred in trust is not to be included in a decedent-settlor's gross estate under Section 302(d), where the exercise of a reserved power to change or modify a trust instrument is contingent upon the happening of an event, the occurrence of which is uncertain and beyond the control of the settlor. In the case at bar, under the trust agreements and other stipulated facts of record, decedent possessed no power at the date of his death to change the enjoyment of the remainder interest. While the basis of the Circuit Court's decision is not clear, we submit that the result reached, in view of the terms of the trust instruments and the other stipulated facts, is necessarily in conflict with the above cases.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with an applicable decision of this Court. We submit that the decision below conflicts in principle with *Porter* v. *Commissioner*, 288

U. S. 436 (1933). Since the sole surviving remainderman in the instant matter was vested with an interest under the trust deed which was beyond the decedent's power to alter, the death of the decedent had no effect upon the interest which would legally require the inclusion of its value in the gross estate. The decision below, therefore, conflicts with the principle enunciated in the *Porter* case.

3. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

Prayer.

For the foregoing reasons, your petitioner prays that a writ of certiorari be issued out of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of said Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed with respect to the decision of the issue here presented; and that petitioner be granted such other and further relief as may be proper.

Estate of Daniel Guggenheim, Deceased,
Florence Guggenheim, Executrix,

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
LUCIUS A. BUCK,
her attorneys.

HENRY BRECKINRIDGE,
PAUL B. BARRINGER,
Of Counsel.

Dated, New York, N. Y., June 5, 1941.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 41) appears at 39 B. T. A. 251. A supplemental opinion of the Board (R. 151) appears at 40 B. T. A. 181. The opinion of the Circuit Court of Appeals (R. 238) appears at 117 F. (2d) 469.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 6, 1941. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, 28 U. S. Code, Section 347(a), as amended by the Act of February 13, 1925.

Statement of the Case.

A summary statement of the facts is given in the petition at pages 3 to 7 above.

Statute Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> "Section 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> • • • • • • • •
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by

trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke, * * *;"

POINT I.

The decision of the Court below is in conflict with the decisions of the Circuit Courts of Appeals in the *Safe Deposit and Trust Co. of Baltimore*, the *Day* and the *Flanders* cases.

While the basis of the Court's opinion is not clear, it is submitted that an analysis of the trust instruments in the light of the other stipulated facts of record demonstrates that the Court's decision is necessarily in conflict with the cases hereinafter discussed.

The vital premise of fact upon which exclusion of the value of the remainder interest under the trust from the settlor's gross estate must rest is that at the time of his death the settlor possessed no power either to cause an invasion of the remainder interest for the benefit of Robert, the life tenant, or to shift the remainder interest from one remainderman to another. It is submitted that this the settlor could not do.

The decedent could, it is true, increase Robert's annual life income up to the full amount of the income of the trust and could also decrease it to zero. But we concede that the value of Robert's life interest is includible in the gross estate. If the trustee had received any distributions upon the stock and securities held in corpus which were designated by the payor thereof as a return of capital, the settlor could cause such moneys to be paid over to any beneficiary. But this and all other reserved powers were subject to the overriding restriction that

they must not be exercised in such a way as to frustrate the essential purpose of the trust, which was to provide for Robert, Robert's children and their descendants, or so as to impair the substantial integrity of the trust fund. Decedent was thus effectively prevented from invading the corpus for Robert's benefit. If the power to cause the limited class of distributions to be paid over to any beneficiary still had any meaning in the face of the foregoing restrictions, there was not more than $46,500 at the date of death upon which the power could have been exercised. This fact goes to the valuation of Robert's life interest rather than to the legality of the inclusion of the value of the whole remainder interest in the settlor's gross estate. It is necessary to draw the line for estate tax purposes between the property the decedent could take away from the remainderman and the property beyond decedent's reach. We firmly believe that at most the amount of corpus subject to change of enjoyment at the date of the decedent's death was not more than $46,500, and even as to this small amount we submit that decedent's power was so hedged about as to be wholly nugatory.

Decedent possessed no power whatsoever to distribute the corpus outright to Robert (except possibly to the extent of $46,500 as above indicated), nor did he have the ability to cut down by indirection the value of the remainder interest. He could increase the latter by reducing the amount of income annually payable to Robert, but that by itself would not require taxing the whole value of the remainder as part of the decedent's gross estate. If he exercised his reserved power to effect a final distribution to beneficiaries and so to terminate the trust, Robert's life estate would end and the remainder would vest. But the line between the life interest and the remainder interest could not thereby be crossed.

A power in the decedent-settlor to shift the enjoyment

of the remainder interest within the remainder class was equally absent at the date of decedent's death. There was then only one remainderman in existence, Robert's child Cordova, and Cordova had no descendants. There was no way in which his remainder interest could be reduced or shifted to someone else, for there was no other remainderman in existence to receive it and the creation of new beneficial interests was forbidden by the trust instrument.

The instant situation thus presents a transfer made subject to a power to change enjoyment where at the date of death no change could be made with respect to the remainder.

The Circuit Court of Appeals for the Fourth Circuit, in *Tait* v. *Safe Deposit and Trust Co. of Baltimore,* 74 F. (2d) 851 (1935), had before it the trust of a decedent in which the settlor had reserved power to alter, exercisable only upon his wife's predeceasing him. She survived the settlor. The question was whether the value of the corpus of the trust should be taxed as part of decedent's gross estate. The Court held that the mere cessation of a contingent power at death was not enough to require the inclusion of the value of the trust in decedent's gross estate.

The Circuit Court of Appeals for the Third Circuit in *Day* v. *Commissioner,* 92 F. (2d) 179 (1937), passed upon the trust of a settlor in which he had reserved the power to alter, exercisable only upon his daughter's majority. The settlor died during the daughter's minority. The question for decision was whether the value of the trust corpus was part of the decedent's gross estate. The Court, in holding the value of the trust not includible, held that there must be a present power to alter, amend or revoke in order to tax the estate upon the value of the trust.

The Circuit Court of Appeals for the Second Circuit, in *Commissioner* v. *Flanders,* 111 F. (2d) 117 (1940), was confronted with a trust wherein the settlor retained power

to consent to a sale of corpus free of the trust only if an emergency arose in the affairs of the Singer Company, whose stock comprised the corpus. No emergency had arisen at the date of the settlor's death. The Court excluded the interest from the gross estate on the ground that the existence of a power, exercisable only on a contingency which never arose, was not legally sufficient to require inclusion of the value of the trust in the gross estate.

The decision of the Court below that the entire value of the trust must be included in the decedent's gross estate is thus, we submit, in sharp conflict with the three above-cited cases.

POINT II.

The decision of the Court below conflicts with the principle of this Court's decision in *Porter* v. *Commissioner.*

In *Porter* v. *Commissioner,* 288 U. S. 436 (1933), this Court enunciated the principle that an interest transferred during life by the decedent is legally part of his gross estate only if the death of the decedent is, as to such interest, "the source of valuable assurance passing from the dead to the living". No such assurance passed to the remainderman here upon his grandfather's death. The remainder interest given him by the trust instrument became completely vested and unalterable when two events entirely unconnected with decedent's death occurred, namely, the death of the son's other child and the son's divorce from his second wife.

The decision below is plainly in conflict with this principle and is also out of line with the trend of the cases already decided upon this point.

Respondent, in his brief submitted before the Court below, contended that the case of *Helvering* v. *Hallock,*

309 U. S. 106 (1940), required the inclusion in decedent's gross estate of the entire value of the trust estate. The Court below did not even discuss the *Hallock* case. That case has no application here, and does not dispense with the necessity for the issuance of a writ of certiorari. In the case at bar, the trust provided that the remainder interest went to the children of Robert, or their descendants *per stirpes*, or their appointees, 20 years after Robert's death. Only if all the named takers failed was the property to revert to the decedent-grantor or his estate. The death of the settlor had nothing to do with this failure. In the *Hallock* case, on the contrary the death of the decedent was the "indispensable and intended event" [*Klein* v. *United States*, 283 U. S. 231 (1931)] which brought the remainder interest into being. See *Commissioner* v. *Flanders*, 111 F. (2d) 117 (1940).

POINT III.

This Court has not yet passed upon the question of whether a transferred interest subject to change through a power which is, however, impossible of exercise at the date of death, should be included in a decedent's taxable gross estate.

The result of the decision below will be to subject decedents' estates to taxation in situations where the decedent has parted with all interest in and powers over property transferred in trust, a consequence which is forbidden by the letter and spirit of Section 302(d) of the Revenue Act of 1926. The question is thus one of general importance in the administration of the Federal estate tax and should be reviewed by this Court.

Conclusion.

This case involves a matter of general public interest and importance in the administration of the Federal estate tax law which has been decided by the Court below in conflict with the decisions of other Circuit Courts of Appeals and in conflict in principle with the *Porter* case. The question should consequently be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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Dated, New York, N. Y., June 5, 1941.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 125

ESTATE OF DANIEL GUGGENHEIM, DECEASED, FLORENCE GUGGENHEIM, EXECUTRIX, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 91–137) is reported at 39 B. T. A. 251. A supplemental opinion of the Board (R. 151–155) is reported at 40 B. T. A. 181. The opinion of the Circuit Court of Appeals (R. 238–249) is reported at 117 F. (2d) 469.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 6, 1941 (R. 254–255). Petition

for a writ of certiorari was filed June 5, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the entire value at decedent-settlor's death of the trust which he established is includible in his gross estate, under Section 302 (d) of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke. * * *
>
> * * * * *
>
> (h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests,

rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C., Title 26, Sec. 411.)

Treasury Regulations 70 (1929 Ed.):[1]

ART. 15. *Transfers during life.*— * * * If the enjoyment of the property or the interest transferred * * * was subject at the date of the decedent's death to change by the exercise of any power to alter, amend, or revoke, * * * the entire value of the property, or the interest transferred, as of the date of decedent's death must be included in the gross estate * * *.

* * * * *

ART. 19. *Power to change enjoyment.*—The value of property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

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[1] The 1929 edition of Regulations 70 were in effect at the date of the decedent's death. These regulations were thereafter superseded by Regulations 80, the corresponding provisions of which appear in Articles 15 and 20.

STATEMENT

The facts with respect to the only issue presented by the petition were stipulated (R. 183–186, 187–238), and may be summarized as follows:

The decedent, Daniel Guggenheim, died September 28, 1930 (R. 123, 183). On October 29, 1917, the decedent created a revocable trust for the benefit of his son, Meyer Robert Guggenheim (hereinafter referred to as Robert), and of Robert's children and descendants (R. 134–135, Ex. 7, R. 187–198). On May 28, 1918, an amended trust agreement was executed, but was also dated October 17, 1917 (R. 185; Ex. 8, R. 198–211). As thus amended, the trust provided for the annual payment of $21,000 of trust income to decedent's son, Robert, therein called the beneficiary, for a period of ten years from October 29, 1917, or until the earlier termination of the trust (R. 200). At the end of ten years, or at the time of any earlier termination, the trustees were to pay the corpus and any accumulations to Robert free of all restrictions (R. 202). In case of Robert's death before termination of the trust, the trust was to continue for twenty years after Robert's death, during which time the child or children of Robert (restricted by definition to children of his first and second marriages) were to receive the income for their maintenance and education until reaching twenty-one, and the income outright after they became twenty-one years of age and until twenty

years after Robert's death, at which time the children were to receive the corpus, including accumulations of income thereon, in equal shares. There were remainders over for the descendants of children dying within the twenty-year period (R. 123–126, 202–204). The settlor reserved to himself a power to modify, alter or revoke the trust (R. 125–126, 207).

On February 14, 1922, the decedent amended the trust in certain respects (R. 126–129; Ex. 9, R. 211–221). He directed that Robert be paid an annual income of $21,000 for life instead of ten years, but reserved the right to direct the trustee to pay Robert more or even all of the trust income or to direct the reduction of Robert's allowance to nothing at all (R. 127, 213–214). All trust income not paid out was to accumulate and become part of the corpus, subject to a reserved right on the part of the settlor to direct payment of any part of such accumulations to any beneficiary (R. 127, 214–215). The trust was to continue for twenty years after Robert's death, during which time the child or children of Robert (restricted again by definition to children of his first and second marriages) were to receive income for their education and maintenance. At the end of the twenty-year period, the trust was to terminate and all funds were to be divided among such children in equal shares; or if any child were then dead, its share was to go to its testamentary appointees or intestate

heirs (R. 215–216). If a child predeceased Robert the share, both of income and principal, which would have vested in the child at Robert's death, was to vest in the child's descendants, *per stirpes,* and all payments were to be made to such descendants under the same conditions as to age, lapse of time and otherwise, as if such payments were to be made to the descendant's ancestor. No descendant could be a beneficiary at any time, however, unless his ancestor, the child of Robert, had died. If neither child nor descendants of children survived Robert, the property was to revert to decedent-settlor or his estate (R. 217). By the same instrument the settlor then conferred upon the three uncles of Robert (the settlor's three brothers) certain powers of management of the trust, including the power to increase the income payable to Robert or to decrease the income, even down to no income at all (R. 128, 218–219). In addition, decedent changed the reserve powers to revoke the trust or to alter the limitations to read as follows (Ex. 9, R. 220–221):

III

> The Settlor hereby relinquishes, abandons and divests himself of all powers by the said trust agreement of the 29th day of October, 1917, reserved to or retained by him to revoke the said trust agreement and the trust existing thereunder, and the said trust agreement shall have effect, and the Trustee shall hold title to the trust fund and

to the properties, interests, and securities comprising the same, and the trust created by the said trust agreement shall be executed and administered as if no power of revocation had ever been reserved to or retained by the Settlor.

IV

Nothing in this instrument contained shall be deemed to affect or limit the power of the Settlor to modify, alter or correct the provisions of the said trust agreement of the 29th day of October, 1917, provided that any such modification, alteration or correction shall not operate to revoke the said agreement or the trust existing thereunder, or to frustrate the essential purposes of the trust of making provisions for the son of the Settlor, and his children or descendants, or to impair the substantial integrity of the trust fund, or to create a beneficial interest in or under the trust, on behalf of the Settlor or any person not previously beneficially interested therein or thereunder. The Trustee shall not be required to pass upon the legal effect of any such modification, alteration or correction made by the Settlor, or to determine whether the same is within the power or authority of the Settlor to make; and by reason of any such modification, alteration or correction made by the Settlor the Trustee shall incur no liability to any person whatsoever. Nor shall anything in this instrument contained be deemed to affect or limit the power of

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> the Settlor, by directions in writing given to the Trustee, to alter, define and prescribe the relative interests of the beneficiaries in the trust fund or the income thereof, their respective shares in the same, their respective powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement, postponement or otherwise, of principal or income, or both, of the trust fund; which power of the Settlor is hereby expressly reaffirmed and reserved, together with the power of causing a final distribution to be made at any time to or among the beneficiaries, or any of them, and so terminating the trust.

By a further instrument dated February 4, 1925 (Ex. 10, R. 222–229), the decedent-settlor again exercised the powers reserved to him (Ex. 8, R. 198–211) to modify, alter, or correct the provisions of the trust agreement. Few of those alterations are material here. That instrument, however, again reaffirms (R. 228–229), in language similar to that just set forth, the decedent's reserved power to modify, alter, or correct the provisions of the trust instrument, as amended and modified.

Robert was divorced from his first wife and remarried in 1915. He had two children by his first marriage, Daniel Guggenheim II and M. R. Cordova Guggenheim. The child Daniel died in 1925

without issue (R. 124, 186). In 1928 Robert was divorced from his second wife, by whom he had no children, and he remarried the same year (R. 124, 186). Thus at the time of decedent's death, Robert had only one surviving child of his first and second marriages, Cordova Guggenheim, born August 13, 1910 (R. 123–124, 186).

The Commissioner of Internal Revenue included the entire value of the trust at the date of decedent's death (R. 36) in decedent's gross estate. The total value of the trust at decedent's death was not less than $2,289,450.62 (R. 129, 233–234). The Board of Tax Appeals sustained the Commissioner's determination in respect to this issue (R. 123–136, 151–155); the Circuit Court of Appeals for the Second Circuit affirmed (R. 246–249).

ARGUMENT

1. By the instrument of February 14, 1922 (Ex. 9), the decedent in terms abandoned his reserve power to revoke the trust which he had established (R. 220) and conferred upon his three brothers certain powers of directing and controlling the administration of the trust and the management of the trust fund (R. 218). Those are substantially all the limitations the decedent placed upon his reserved powers. He did not divest himself before his death of all power, by alteration or amendment of the trust instrument, to effect any change in the enjoyment of the trust property.

To the contrary, by the modifying instrument of February 14, 1922 (Ex. 9), and by the further modifying instrument of February 4, 1925 (Ex. 10), the decedent meticulously reserved to himself and to himself alone certain powers of modification and alteration of the trust instrument. These reserved powers are set forth in the instrument of February 4, 1925, in the following words (R. 228–229):

> Nothing in this instrument contained shall be deemed to affect or limit the power of the Settlor to modify, alter or correct the provisions of the said trust agreement made as of the 29th day of October, 1917, as amended and modified, provided that any such modification, alteration or correction shall not operate to revoke the said agreement or the trust existing thereunder, or to frustrate the essential purposes of the trust of making provisions for the son of the Settlor and his children or descendants or to impair the substantial integrity of the trust fund, or to create a beneficial interest in or under the trust, on behalf of the Settlor or any person not previously beneficially interested therein or thereunder. * * * Nor shall anything in this instrument contained be deemed to affect or limit the power of the Settlor, by directions in writing given to the Trustee, to alter, define and prescribe the relative interests of the beneficiaries in the trust fund or the income thereof, their respective shares in the same, their respective

> powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement, postponement or otherwise, of principal or income, or both, of the trust fund: which power of the Settlor is hereby expressly reaffirmed and reserved, together with the power of causing a final distribution to be made at any time to or among the beneficiaries, or any of them, and so terminating the trust.

Within the limitations thus imposed the decedent could make alterations in the trust instrument as he chose. The class of beneficiaries was limited at decedent's death to decedent's son Robert and the latter's son Cordova. As between them, however, the decedent could "alter, define and prescribe" their "relative interests * * * in the trust fund or the income thereof, their respective shares in the same, their respective powers with respect to such shares," etc., and could then cause a final distribution to be made and terminate the trust (R. 228–229). It will also be noted that the decedent had another express power, in addition to or overlapping with those just described, to direct and require the trustee to pay "to any beneficiary" *any and all trust income* and "any and all receipts of sums of money or other cash disbursements in the nature of return of capital or distribution of assets" (R. 227). See also stipulation

No. 3 before the Board (R. 150). In such circumstances the decisions are unanimous that the decedent-settlor reserved sufficient powers to himself to bring the corpus of the trust within Section 302 (d) of the Revenue Act of 1926. *Commissioner* v. *Chase Nat. Bank,* 82 F. (2d) 157, 158 (C. C. A. 2d), certiorari denied, 299 U. S. 552; *In re Tyler's Estate,* 109 F. (2d) 421 (C. C. A. 3d); *Holderness* v. *Commissioner,* 86 F. (2d) 137, 138–139 (C. C. A. 4th); *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.). See also *Porter* v. *Commissioner,* 288 U. S. 436; *Chickering* v. *Commissioner,* 118 F. (2d) 254 (C. C. A. 1st); *Witherbee* v. *Commissioner,* 70 F. (2d) 696, 697 (C. C. A. 2d), certiorari denied, 293 U. S. 582; rehearing denied, 293 U. S. 631; *Millard* v. *Maloney* (C. C. A. 3d), decided June 6, 1941, not yet officially reported but found in 1941 Prentice-Hall, Vol. 4, par. 62,739; *Cook* v. *Commissioner,* 66 F. (2d) 995 (C. C. A. 3d); *Dort* v. *Helvering,* 69 F. (2d) 836, 840–841 (App. D. C.). Cf. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 45, 51–52.

2. Petitioner concedes (Pet. 5, Br. 10), as indeed she must, that under the power to modify the decedent could retake from the three uncles the power to increase or decrease Robert's income,[2] but urges that decedent had no power to reduce the remainder for Robert's benefit. As noted, how-

[2] Hence petitioner admits (Pet. 2, Br. 10) that the value of Robert's life interest should be included in decedent's gross estate.

ever, in the preceding paragraph, decedent reserved the power to direct the payment "to any beneficiary" of any and all trust income and any and all receipts of money or other cash disbursements in the nature of return of capital or distribution of assets (R. 227). Thus decedent might have directed the disbursement to Robert (or to Robert's child) of all the very large profit realized from the sale by the trustee of Kennecott Copper Corporation stock (R. 150), and so likewise the profit on any other sales.[3] By reason of such provision (R. 227) and of the further powers specifically reserved to decedent (R. 221, 228–229) "to alter, define and prescribe the relative interests of the beneficiaries *in the trust fund or the income thereof,* their respective shares in the same," etc., there thus was no substantial remainder interest whatever for Cordova Guggenheim which decedent could not impair and divert to Robert. [Italics supplied.][4]

3. The decision of the court below is not in conflict with its previous decision in *Commissioner* v.

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[3] This is in addition to the $46,500 return of capital on Anglo-French and on Braden Copper Mines Company bonds (R. 230–231), the distribution of which apparently the petitioner concedes (Pet. 6, Br. 11) was subject to decedent's control.

[4] Petitioner assumes (*viz*, Pet. 8, Br. 10) a contrary construction of the trust agreement. Petitioner's construction is at total variance with the construction placed on the instrument by the Board (R. 132–135, 152–155) and by the court below (R. 248–249).

Flanders, 111 F. (2d) 117, or with *Day* v. *Commissioner* 92 F. (2d) 179 (C. C. A. 3d), or *Tait* v. *Safe Deposit & Trust Co. of Baltimore,* 74 F. (2d) 851 (C. C. A. 4th).

The Flanders trust was created in 1910 and was not subject to alteration or change. It was terminable by sale, upon consent of the settlor, but *only* if some emergency or change occurred in the affairs of the corporation whose stock formed the trust corpus which rendered it "advisable" to the trustees, one of whom was a remainderman under the trust, "in the exercise of a sound discretion and judgment" to sell. In that event the proceeds of the sale were payable to the settlor as his absolute property. No such change took place or emergency arose in the affairs of the corporation. The court held the trust corpus not taxable as a part of the settlor's estate, for both or either of two reasons: (1) the settlor's power to consent to a sale of the trust property and termination of the trust, exercisable only in conjunction with the trustees, was a power conditioned upon the exercise by the trustees of a discretion dependent on the existence of an emergency or change in the affairs of the corporation, which condition never happened; and (2) the trustee-brother of the settlor, as a remainderman under the trust, had an interest adverse to any sale, the proceeds of which must be paid to the settlor. Since the trustee had such an adverse interest, the case was thought to be ruled by the prin-

ciple which governed in *Helvering* v. *Helmholz*, 296 U. S. 93, 97–98. Such is not the case here.

Nor is *Day* v. *Commissioner, supra,* in conflict. The settlor there, unlike the decedent-settlor here, had no present power to alter or amend the trust. The power in issue was a contingent power exercisable only upon the assent of the settlor's daughter-beneficiary, "after she shall have attained her majority." The settlor died during the daughter's minority. Likewise in *Tait* v. *Safe Deposit & Trust Co. of Baltimore, supra,* the particular power was not a present power but a contingent power; to exercise it the settlor had to survive his wife. She survived him. The settlor, however, had a noncontingent and absolute power to alter the remainder interest in one-half of the trust, after the estate of his wife. It was therefore conceded and recognized in that case (p. 855) that the power reserved by the grantor to vary the provisions of the deed relative to the disposition of this remainder interest "was sufficient to make the transfer to this extent one in which the enjoyment thereof was subject to change by the grantor at the date of his death within Section 302 (d) of the Revenue Act of 1926." *Tait* v. *Safe Deposit & Trust Co. of Baltimore, supra,* in consequence, sustains and supports the decision of the Second Circuit in this case.

4. The decision below is not in conflict with the principle of this Court's decision in *Porter* v.

Commissioner, 288 U. S. 436, 443. Petitioner's argument to the contrary is premised entirely upon the erroneous assumption that Cordova Guggenheim had a substantial and valuable remainder interest under the trust instrument not subject to alteration or change by the decedent-settlor during his lifetime. That premise is unsound. Here, as in the *Porter* case, the settlor's death "terminated" his control, "ended the possibility of any change by him, and was, in respect of title to the property * * *, the source of valuable assurance passing from the dead to the living." *Porter* v. *Commissioner, supra,* p. 444. Thus, as in the *Porter* case, the value of the corpus of the trust is subject to tax by Section 302 (d), and the court below properly so held.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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